Supreme Court, U.S.
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No. 00-946

In the
SUPREME COURT OF THE UNITED STATES

S.S., by and through Her Next Friend and Guardian *Ad Litem*, ELLEN D. JERVIS
Petitioner,

v.

MICHELLE McMULLEN, SHERRY JACOBY, and KATHLEEN BARNETT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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39 pp

QUESTION PRESENTED

Can a substantive due process claim be stated against state social workers for failing to prevent sexual abuse by a third party that occurred after the child was returned to her father's custody pursuant to a court order?

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INTRODUCTION AND STATEMENT OF THE CASE

More than a decade ago this Court conclusively answered the question presented by this petition. In *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 201 (1989), this Court held that "the State does not become the permanent guarantor of an individual's safety by once having offered him shelter." The claim raised in the instant petition–that the State, by taking a child into its custody, undertakes an affirmative duty to prevent harm that occurs after such custody is terminated–was explicitly rejected in *DeShaney*, and has not, contrary to petitioner's suggestion, been questioned by any authoritative decision of any other circuit court of appeals. This Court should decline petitioner's invitation to again take up the question it answered in *DeShaney*.

Statement of Facts

For the purposes of this petition, we must assume the truth of the undeniably tragic facts fully set forth in plaintiff's complaint, found in Respondents' Appendix (Resp. App.) at A1-A15. The complaint alleged that in January 1994, when S.S. was almost three years old, she was taken from the custody of her father and placed into the custody of the Missouri Division of Family Services ("Division"). Resp. App. at A2-A3. This action followed allegations that S.S. was physically abused and neglected by her father, and that she was sexually abused by an unknown person. *Id.*

S.S., while in the legal custody of the Division, was gradually returned to the physical custody of her father through a progression of supervised visits, followed by unsupervised visits, which ultimately culminated in her living with her father full-time beginning March 8, 1996. Resp. App. at A3-A5. In

August, 1996, several months after full-time physical custody of S.S. had been transferred to her father, Joel Griffis, a family friend who at an undisclosed time was a child sexual offender, complained that it was unfair that his contact with S.S. was being limited. Resp. App. at A4. Despite the knowledge that S.S. was having contact with Griffis, her treating psychologist recommended, later in August, 1996, that S.S. be returned to the custody of her father. Resp. App. A12-A13. Thereafter, on August 22, 1996, the Circuit Court of Cass County ordered that S.S. be released from its jurisdiction and that legal custody of S.S. be returned to her father. Resp. App. at A5.

The complaint alleges that Joel Griffis sexually abused S.S. on two occasions; the first on November 15, 1996, nearly eight months after her father gained full-time physical custody of S.S. and nearly three months after the court terminated the Division's legal custody. Resp. App. at A5-A6. There is no allegation in the complaint, however, that the sexual abuse of S.S. took place while she was in either the physical or legal custody of the Division. See Pet. App. at 52a ("Plaintiff does not allege that she was abused while she was visiting her father and still in state custody. This would be a very different case if she had."). The cause of action plaintiff pleaded against each defendant was limited to a failure to foresee, and thus prevent, the sexual abuse that took place while the child was in her father's custody: "Defendant failed to exercise professional judgment in pursuing the child's release from the custody and protection of the State because she knew or should have known that the father had not protected and would not protect the child from Joel Griffis and that S.S.'s subsequent sexual molestation was reasonably foreseeable." Resp. App. at A6, A8, A11.

The Decisions Below

Each of the three decisions below recognized, as petitioner does not, that cases holding state officials liable for harm caused by others arise from two distinct and independent lines of reasoning. The first line arises in cases where the state has taken the individual into custody or otherwise limited the individual's ability to care for themselves. See Pet. App. at 52a. But this special custodial relationship liability is limited, as even the panel opinion finding in petitioner's favor noted, to the duration of that relationship:

> S.S.'s reliance upon the "special relationship" theory is unavailing. Although the state has a constitutional obligation to protect certain individuals under its care, that duty cannot extend beyond the existence of the "special relationship" in question. Because the "special relationship" itself creates the state's duty to protect, the duty cannot outlive the relationship.

Pet. App. at 31a-32a.

The second line of authority arises from "state-created danger" cases, in which the state affirmatively places an individual in a position of danger the individual would not otherwise have faced. *See* Pet. App. at 52a. The *en banc* decision below held that the state-created danger doctrine did not apply to the present matter "for the simple reason that in returning S.S. to her father, the state did not increase the danger of significant harm to S.S.: It merely placed her back into the situation from which it had originally retrieved her." Pet. App. at 4a. The dissenting members of the court did not dispute that a distinction must be made between "failure[s] to protect the victim" and "affirmative acts of endangerment," but only

differed with the majority on where the line between action and inaction should be drawn. Pet App. at 14a. Crucially, the dissent does not challenge the key finding of the majority opinion–that the state officials did not increase the danger to S.S. by returning her to the same situation from which it took her. Instead, the dissent argues that the question of whether the state enhanced the danger is unimportant:

> I believe the proper distinction is whether the state actors have so intervened in the child's situation that they can be said to have rescued the child from danger. At that point, the child's fate is in the state's hands, whether it decides to entrust him to stranger or kin, to new dangers or old.

Pet. App. at 16a. Thus, the question that divided the *en banc* court below is whether the state, having once protected a person from danger, thereby assumes a duty under the Constitution to continue that protection indefinitely. *DeShaney* answered that question unambiguously in the negative.

REASONS FOR DENYING THE WRIT

The Eighth Circuit, *en banc*, properly concluded that this case is substantively indistinguishable from *DeShaney*. The conflict petitioner purports to find between the decision below and the decisions of the Seventh and Third Circuits is spurious. The decision of the Seventh Circuit upon which petitioner relies explicitly provides that cases where the state ends its custody of a child by returning the child to its parents cannot give rise to substantive due process liability. The Third Circuit decision on which petitioner relies is completely irrelevant because in that decision–which was issued without opinion–the court was not even presented with the question at

issue here.

In addition, the writ should be denied because the Eighth Circuit, *en banc*, properly concluded, as an independent alternative basis for decision, that the state actors here are accused, at most, of negligently reuniting a child with her father. This allegation falls far short of the kind conscience-shocking abuse of power required to state a claim under this Court's substantive due process jurisprudence.

1. This case is indistinguishable from *DeShaney*

The relevant facts before this Court in *DeShaney* are indistinguishable from those alleged in the complaint below. Like this case, *DeShaney* presented an "undeniably tragic" case of child abuse, for which the child sought to recover from state social services workers. *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 198, 191 (1989). Joshua DeShaney, like S.S., was approximately three years old when he came to the attention of Wisconsin child welfare authorities. *Id.* at 192. At that time, complaints to police of physical abuse the boy's father inflicted upon him, as well as evidence of physical injuries led the county department of social services to seek and obtain a court order removing the child from his father's custody. *Id.* The county then convened a "Child Protection Team," which decided that the evidence of abuse was insufficient to retain Joshua in the court's custody, but recommended continued monitoring of the child as a protective measure. *Id.* Pursuant to this recommendation, the court terminated its jurisdiction over the boy and returned him to his father's custody. *Id.* During subsequent visits to the boy's home, caseworkers noted suspicious, new injuries to the boy. *Id.* at 192-93. Even after a second emergency room admission, where the medical personnel again indicated that child abuse was likely, the authorities did not take any action. *Id.* at 193.

A little more than a year after the state returned the boy to his father's custody, the father beat him so severely that he fell into a coma and suffered profound, permanent brain damage. *Id.*

This Court, in an analysis precisely followed by the Eighth Circuit here, first addressed the question of whether a special relationship existed between the state social workers and the child. Examining its previous decisions in the context of prisoners and others involuntarily restrained by the state, *see, e.g., Youngberg v. Romeo*, 457 U.S. 307 (1982) (involuntarily committed mental patients); *Estelle v. Gamble*, 429 U.S. 97 (1976) (prisoners), this Court concluded that the affirmative duty of care those decisions recognize is limited to the duration of the custodial relationship. *DeShaney,* 489 U.S. at 200-01. Because the abuse occurred while the boy was not in the state's custody, this Court concluded, the special relationship analysis was inapplicable. *Id.* at 201. The Court then explicitly addressed and rejected the argument that petitioner urges most strongly here:

> While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua.

Id.

Petitioner makes no attempt to distinguish *DeShaney* from the present matter. Instead, petitioner suggests, based apparently upon the first sentence of the previously quoted paragraph, that *DeShaney* left "open the question of whether due process rights are violated when the state affirmatively places a child previously in state custody into circumstances that render her more vulnerable and susceptible to danger." Pet. at 8-9. That may be true; but it fails to recognize that in the remainder of the paragraph this Court unambiguously held that the return of a child to his father's custody, which placed the child in no more danger than if the state had not intervened at all, does not amount to the creation of a danger by the state. The same is true here, and the Eighth Circuit properly concluded that *DeShaney* controls the outcome of this case.

2. The decision below does not conflict with the opinion of any other appellate court

Petitioner claims that the Eighth Circuit's decision below conflicts with the decisions of the Seventh and Third Circuits. To find a conflict with the Seventh Circuit, petitioner misrepresents the opinion of the Eighth Circuit. And to find a conflict with the Third Circuit, petitioner puts words in that court's mouth.

Not content to claim that the Seventh Circuit opinion in *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990), is contrary to the present opinion, petitioner asserts that the Eighth Circuit decision concedes that this is the case: "The decision itself admits that 'a leading case involving similar circumstances in another circuit reached a contrary result.'" Pet. at 9. This "admission" is produced by misquoting the opinion below, which actually says: "We are aware that a leading case involving *arguably* similar circumstances in another circuit reached a contrary result, but we think that its

facts serve to distinguish it from our case." Pet. App. at 5a (emphasis added, internal citation omitted). Actually, the two cases differ in a key respect highlighted in *K.H.*

The key fact distinguishing this case from *K.H.* is that in *K.H.* state officials had removed the plaintiff child from her parents' custody and then placed her in the custody of a foster parent who was incompetent to care for her and physically abused her. 914 F.2d at 848-49. Although petitioner suggests that this is a distinction without a difference, it is a distinction that was explicitly recognized as determinative not just in *K.H.* but, more importantly, in *DeShaney* itself. The *K.H.* court carefully distinguishes its decision from cases where the parents were the abusers, which were decided by *DeShaney*:

> This is not a "positive liberties" case, like *DeShaney*, where the question was whether the Constitution entitles a child to governmental protection against physical abuse by his parents or by other private persons not acting under the direction of the state. The Supreme Court agreed with this court that there is no such entitlement. Here, in contrast, the state removed a child from the custody of her parents; and having done so, it could no more place her in a position of danger . . . than it could . . . place a criminal defendant in a . . . prison in which his health or safety would be endangered . . . .

Id. at 848-49 (citing *Estelle v. Gamble*, 429 U.S. 97 (1976)). The court continues that this analysis is sound "even if one concedes, as one must in the light of *DeShaney*, that the State . . . has no constitutional obligation to protect children from physical or sexual abuse by their parents. The state could have left K.H. to the tender mercies of her parents without thereby

violating . . . the Constitution." *Id.* at 849. After finding a right to be free from abusive foster care placements while in state custody, the court re-emphasizes the limits of its holding:

> Certainly if the state decides to return a child whom it has taken custody of to the child's natural parents, those parents do not become state agents. That would undo *DeShaney*. . . . .
>
> . . . . [T]here is indeed a difference between placing a child with a member of her family and placing the child with a foster parent. It is notable in this connection that K.H. does not focus on the return to her parents as a placement for which she seeks damages. The focus is on her placement with a nonrelative foster parent . . . .

Id. 852-53.

That the *K.H.* court makes much of this distinction is unsurprising, since it is explicitly recognized in *DeShaney*: "Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect." 489 U.S. at 201, n.9. Contrary to petitioner's suggestion, *K.H.*, as much as the decision below, recognizes the fundamental difference between taking a child from her parents and placing her in a dangerous situation that she would not have faced but for the state's actions, and simply returning the child to face a danger that she would have faced had the state never intervened.

Nor has the Seventh Circuit questioned this principle in

the other decisions petitioner cites. In *Bank of Illinois v. Over*, 65 F.3d 76 (7th Cir. 1995), the court denied substantive due process liability for injuries caused to a child while in her father's home. The court did note, in dicta, that the child, who was in her mother's sole legal custody, could have stated a claim against state agents if they had delivered her to her father in violation of a court order limiting his visitation to supervised times and places, thus leaving the child exposed to a danger that she would not have faced without their intervention. *Id.* at 77-78. This is fundamentally different from the present situation where S.S. was returned to her father's custody pursuant to a court order and faced no more danger than she would have faced had the state not intervened at all.

Camp v. Gregory, 67 F.3d 1286 (7th Cir. 1995), is also distinguishable. There, the child was, at the time of his death, under the legal guardianship of the state. *Id.* at 1295. Thus, while his physical custody had been returned to his aunt, who had previously been his guardian, the Seventh Circuit held that the continued guardianship by the state imposed a continuing affirmative duty to place the child with appropriate caregivers. *Id.* at 1296-97. Perhaps *Gregory* would conflict with the decision below if the abuse suffered by S.S. had occurred while she was in the state's legal, but not physical custody. But the complaint contains no such allegation. Petitioner's invocation of *Gregory*, *Over* and *K.H.* to support a claim of conflict is without merit.

Petitioner's claim of conflict with the Third Circuit Court of Appeals is even less plausible. Petitioner claims that, "[u]nlike the Eighth Circuit, the Third Circuit has specifically recognized that a custody transfer to a known abusive biological parent caregiver is not an 'inaction' but is instead an affirmative act of endangerment." Pet. at 11. But the Third Circuit's supposed specific recognition of this position is merely an

affirmance, without opinion, of the district court's ruling in *Ford v. Johnson*, 899 F. Supp. 227 (W.D. Pa. 1995), *aff'd* 116 F.3d 467 (1997). Assuming a memorandum affirmance can ever be an endorsement, it could not be in *Ford*. There plaintiff, not the defendant, appealed the decision of the district court dismissing several of her claims. *See* 899 F. Supp. at 234-35 and *Ford v. Johnson*, No. 96-3513, 1997 U.S. App. LEXIS 159301 (3d. Cir. May 21, 1997) (noting the designation of the parties on appeal). The portion of the trial court's ruling refusing to dismiss plaintiff's "state-created danger" claim was apparently never before the Third Circuit.

Moreover, even the words of the District Court for the Western District of Pennsylvania that the Third Circuit "specifically recognized," do not conflict with the decision below. In *Ford*, a child's mother sued on her own behalf and as administratrix of her daughter's estate after the daughter, who had been removed from state custody and placed with her father, was beaten to death by him. 899 F. Supp. at 229. The district court did not clearly answer one question critical to the *DeShaney* analysis: would the girl ever have been in the custody of her father but for the intervention of the state? The court suggests an answer in the negative: "It is important to remember that in the case at bar, Shawntee had not been in the custody of her father, but, rather, had been in the custody of [the state] and was placed with her father by the court after a [state] investigation and recommendation." *Id.* at 233.

Petitioner also asserts conflict with another district court decision, *Currier v. Doran*, 23 F. Supp. 2d 1277 (D.N.M. 1998). But that case is clearly distinguishable because the court answered the *Ford* question by clearly disclosing a critical distinguishing fact. The *Currier* result was different from *DeShaney*, "because [the child] was not originally in his father's custody. Instead, he was removed from one custody situation

and placed with his father by the state. The court finds this a significant difference from *DeShaney*, and one possibly (depending on the facts Plaintiffs might prove) warranting a different result." *Id.* at 1280. *Currier* holds, as *Ford* suggests, that if the child had not previously been in her father's custody, placement with him by the state presented a new danger, not the revival of an old one as in the case at bar.

No published opinion from any court has disagreed with the Eighth Circuit that *DeShaney*, by its unambiguous terms, insulates state actors from liability for the conduct alleged here: relinquishing the physical and legal custody of a child to a parent from which that custody had been temporarily taken. Such an action, as *DeShaney* indicates, leaves the child in no worse position than if the state had never intervened at all, a conclusion which defeats substantive due process liability on a state created danger theory.

3. The conduct alleged here does not rise to the level of egregiousness required for a substantive due process violation

This Court recently examined at some length the level of culpability government officials must possess in order to violate the substantive due process rights of an individual. In *County of Sacramento v. Lewis*, this Court explained that its "cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be arbitrary in the constitutional sense" and that "the Due Process Clause was intended to prevent government officials from abusing their power, or employing it as an instrument of oppression." 523 U.S. 833, 846 (1998) (internal citations omitted). Actionable conduct must be that which shocks the conscience in a constitutional sense. *Id.* at 847-48. Thus, this Court noted, it has "rejected the lowest common

denominator of customary tort liability as any mark of sufficiently shocking conduct," and instead has held "that the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Id.* at 848-49. It is extremely egregious conduct, rather, that gives rise to substantive due process violations: "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to give rise to the conscience-shocking level." *Id.*

Petitioner never contends that state officials returned S.S. to her father with the intention of causing her harm, or with any other malicious motive. Instead, petitioner here urges this Court to adopt a lower standard than intent, specifically the deliberate indifference standard applicable to those with a duty to care for an individual in a custodial context.[1] Petitioner's argument relies on this Court's analysis in *Lewis*. There, this Court held that the deliberate indifference standard was not applicable to a spontaneous police chase because, unlike the case of a custodial prison official, the chasing officer had little opportunity to act with deliberation in considering whether and how to pursue a fleeing suspect. *Id.* at 850-52. Since a state worker deciding whether to reunite a child with her parent does not act in haste, petitioner argues, deliberate indifference is the proper standard to judge the official's conduct.

This argument reads *Lewis* too narrowly. A standard less than intentional conduct is appropriate with respect to providing safety in a custodial setting not merely because decisions may be considered fully, but also because no

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[1] In fact, the complaint alleges no more than negligence in claiming that respondents "knew or should have known" of the danger S.S. faced. See, *infra*, pp. 15-16.

"substantial countervailing interest excuse[s] the State from making provision for the decent care and protection of those it locks up." *Id.* at 851. Where a state worker is charged with deciding whether to maintain state custody of a child at the expense of her parents, substantial competing interests are at work. While the state's concern for the safety and well-being of children is, of course, paramount, it can hardly be said that the interests of the parents, the child and the state in preserving the integrity of families, an interest this Court has identified as a fundamental component of liberty, is not entitled to any consideration. As Judge Posner noted in *K.H.*, these sometimes competing interests impose difficult choices on child welfare workers:

> State employees who withhold a child from her family run the risk of being sued by the family for infringing their liberty of familial association, and we do not want to place child welfare workers on a razor's edge–damned if they return the child to its family and damned if they retain custody of the child and place him in a foster home or institution.

914 F.2d at 853 (internal citations omitted). That S.S. was returned to the custody of her father, as opposed to being placed with a foster family brings this case within the conundrum Judge Posner described. Because of the substantial competing interests at stake, the actions of the state officials who are charged to make such difficult decisions should not be judged to shock the conscience on anything less than allegations of intentionally arbitrary and oppressive behavior.

Even accepting *arguendo* plaintiff's deliberate indifference standard as the proper one here, plaintiff's claim would nevertheless fail, because plaintiff has, at most, pleaded

a cause of action for negligence. The key allegation in plaintiff's complaint is that: "Defendant[s] failed to exercise professional judgment in pursuing the child's release from the custody and protection of the State because [they] knew or should have known that the father had not protected and would not protect the child from Joel Griffis and that S.S.'s subsequent sexual molestation was reasonably foreseeable." Resp. App. at A6, A8, A11. This allegation falls short of the constitutional standard for deliberate indifference. That standard does not permit liability merely because the risk is one that is so obvious that the defendant knew or should have known of it. Rather, the official must be aware not only of the facts from which the inference could be drawn that a substantial risk exists, but the official must in fact have drawn that inference and then disregarded it. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Nothing in plaintiff's complaint, as the court below held, alleges anything more than negligence, and the Eighth Circuit properly determined that defendants' conduct, as alleged, does not shock the conscience in a constitutional sense.

4. Defendants are absolutely immune from suit for recommendations made to the juvenile court

Although neither the Eighth Circuit nor the district court reached the question,[2] certiorari should also be denied because the dismissal of this suit was proper on the independent, alternative basis–that defendants are absolutely immune from suit. As noted above, defendants are being sued for failing to exercise professional judgment in pursuing the release of S.S. from the jurisdiction of the juvenile court. The fact remains, however, that the question of whether to terminate that jurisdiction was not decided by those officials but was adjudicated by a judge in a judicial proceeding. This Court has

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[2] See Pet. App. at 49a, n.1.

held that common law extends absolute immunity to"all persons–governmental or otherwise–who [a]re integral parts of the judicial process" and that § 1983 did not abrogate that doctrine. *Briscoe v. LaHue*, 460 U.S. 325, 335-41 (1983). When a state official appears as a witness, that official is entitled either to the absolute immunity accorded any witness in a judicial proceeding, or, if that official is instead viewed as "an official performing a critical role in the judicial process," then the official should be accorded the same absolute immunity that attaches to judges and prosecutors. *Id.* at 335-36. Like the police officers at issue in *Briscoe*, the defendants here are entitled to absolute immunity, whether they are viewed merely as witnesses in the juvenile court proceeding, or whether they are viewed as state officials exercising a critical role in that judicial proceeding. *See Myers v. Morris*, 810 F.2d 1437, 1466-67 (8th Cir. 1987) (guardians ad litem and other professionals are absolutely immune for recommendations made to family court regarding parental visitation of children suspected of being abused).

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There is no doubt, as this Court noted in *DeShaney*, that natural human sympathy favors compensating the victims of child abuse. 489 U.S. at 202-03. But as this Court also noted, creating constitutional liability for state officials who must decide whether and when children are to be taken from, or reunited with, their parents, has the potential to distort necessary decisions. *Id.* at 203. The result petitioner seeks here would have the deleterious effect of underprotecting children and their families. State officials would, as an initial matter, have strong incentives to delay removing endangered children from their parents' custody as long as possible, since under petitioner's theory, the state would then become the guarantor of the child's safety indefinitely, whereas taking no action

would avoid all liability. Once the state takes custody, officials would have equally strong incentives never to reunite children with their parents. Because children are generally removed from their parents' custody due to their parents' lack of fitness, reuniting the family would always be legally perilous, as state officials would, by the nature of the situation, have notice that the parents pose some danger to the child. Balancing these important, competing objectives is a job better left, as this Court suggested in *DeShaney*, to the more flexible devices of state tort and family law, than to the amorphous body of substantive due process law.

CONCLUSION

For these reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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January 2001

APPENDIX

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Petitioner's Complaint filed in U.S. District Court,
Case No. 97-0608-CV-W-SOW A1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

S.S., by an through her Next Friend and guardian ad litem , Elllen D. Jervis,	)	
Plaintiff,	)	
v.	)	Case No. 97-0608-CV-W-SOW
Michelle McMullen, Sherry Jacoby, Kathleen Barnett, and Cynthia M. Montgomery, Ph.D.,	)	
Defendants.	)	

COMPLAINT

COMES NOW Plaintiff, S.S., a minor, by and through her Next Friend and guardian ad litem, Ellen D. Jervis, and for her cause of action states and alleges as follows:

1. This action arises under 42 U.S.C. § 1983 and the Due Process Clause of the Fourteenth Amendment to The United States Constitution. Jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1343.

2. Venue of this action arises under 28 U.S.C. § 1391 because Plaintiff's claim arose in the Western District of Missouri.

3. Plaintiff was at all times relevant to this lawsuit

a resident of the State of Missouri and a United States citizen.

4. At all times relevant to this lawsuit, Defendant Michelle McMullen was employed as a Division of Family Services social service worker by the State of Missouri. She is being sued individually and in her official capacity.

5. At all times relevant to this lawsuit, Defendant Sherry Jacoby was employed as a Division of Family Services social service worker by the State of Missouri. She is being sued individually and in her official capacity.

6. At all times relevant to this lawsuit, Defendant Kathleen Barnett was employed as a Division of Family Services Supervisor by the State of Missouri. She is being sued individually and in her official capacity.

7. At all times relevant o this lawsuit, Defendant Cynthia Montgomery was employed by the Missouri Division of Family Services as a contract therapist. She is being sued individually and in her official capacity.

COUNT I

For Count I of her Complaint against Defendant McMullen, Plaintiff states and alleges as follows:

8. Plaintiff hereby incorporates by reference as though fully set forth herein paragraph 1 through 7 of Plaintiff's complaint.

9. On or about January 20, 1994, S.S. (born February 21, 1991) was taken into protective custody by the Missouri Division of Family Services' Cass County office. It was alleged that the child, not quite 3 years old, had human

feces smeared on her face by her father, Jon Spindle. It was further alleged that she was locked in her bedroom for periods of time by her parents and that she had been sexually abused by an unknown perpetrator. The family previously had several substantiated child abuse hotlines for neglect.

10. On April 5, 1994, the Circuit Court of Cass County, Missouri placed S.S. in the custody of the Division of Family Services for placement in Foster care.

11. On or about February 2, 1994, Defendant McMullen was assigned to the case. During the father's subsequent visits with S.S., supervised by Defendant McMullen in her capacity as a Division of Family Services Social Service Worker, II, an individual named Joel Griffis, reportedly a friend of the fathers, was present on July 18, 1995, August 18, 1995 and August 25, 1995.

12. On or about September 20, 1995, Defendant McMullen's dictation records reflect her receipt of an anonymous telephone call, . . "stating that a man named Joel who has been convicted of numerous sex charges has been around [S.S.] and her father Jon Spindle."

13. Although now aware that the father's friend was allegedly a convicted pedophile, Defendant McMullen allowed the father to begin having unsupervised visits with S.S. The unsupervised contact was continued by the Defendant although she was informed by various sources that the father had allowed contact between Mr. Griffis and S.S. on October ć, 1995; November 28, 1995; December 18, 1995; January 10, 1996; February 13, 1996; April 12, 1996; July 2, 1996; July 19, 1996; and August 15, 1996.

14. On or about February 27, 1996, the father told

Defendant McMullen that he did not perceive Joel Griffis' contact with his daughter to be a problem.

15. On or about May 7, 1996, Defendant McMullen received a copy of a psychological evaluation conducted on S.S.'s father at the request of the Division of Family Services by Dr. Gregory Sisk, that stated in part that, ". . . children in his care could be at risk of abuse/neglect due to his beliefs about child rearing . . " and that ". . . plans toward reunification should proceed cautiously." Dr. Sisk's report further states, "He seems dangerously sympathetic with a known child sexual offender, which would appear to be a very risky behavior."

16. On or about July 1, 1996, Defendant McMullen was aware of an anonymous child abuse hotline call to her office alleging that ". . . S. had a rash 'down there' that there is also a man who hangs around the household that S.S. calls grandpa and that he used to be a child molester."

Defendant McMullen investigated the report by questioning the child at her day care and visually examining S.'s "vagina area", stating that, ". . . I saw nothing." Defendant never called law enforcement authorities and did not have S.S. examined by a medical professional before the above sexual abuse allegation was found to be unsubstantiated.

17. On or about August 13, 1996, Defendant McMullen received a telephone call from Joel Griffis who stated that it was unfair to limit his contact with S.S.

18. Although aware of the father's repeated failure and refusal to protect S.S. from Joel Griffis, Defendant McMullen allowed the child, a minor in custody of the State Division of Family Services, to have unsupervised visits with the father from approximately October 6, 1995 until March of

1996. On March 8, 1996, the Division (at worker discretion) sent S.S. to live full-time with her father on an "extended visit," although still legally in the Division custody until the child's release from jurisdiction on August 22, 1996.

19. Defendant McMullen requested that the Court release S.S. from the custody of the State and to return her to the legal custody of her father on August 21, 1996. Her dictation on that date states that at a staffing held with her supervisor, they decided, ". . . that if something happens to S. because he [the father] knows what Joell [sic] has done in the past that [sic] he will be solely responsible."

20. On or about August 22, 1996, the Circuit Court of Cass County followed the recommendation of Defendant McMullen and the Division of Family Services and returned S.S. to the legal custody of her father, Jon Spindle. The child was released from the Court's jurisdiction at that time.

21. On or about February 5, 1997, a child abuse hotline was received in Jackson County, Missouri alleging that on at least two occasions, November 15, 1996 and January 15, 1997, Joel Griffis had sexually molested S.S. This included periods of time when the father had allowed Griffis to live with him and S.S. S.S. was again placed in the protective custody of the Missouri Division of Family Services on February 11, 1997, by the Jackson County office.

22. After police investigations in Grandview, Jackson County, Missouri; and Belton, Cass County, Missouri; Joel Griffis was charged with two counts of 1st degree statutory sodomy in Jackson County and with two counts of statutory sodomy in Cass County. The father, Jon Spindle was charged with four counts of felony endangerment of a child in Jackson County.

23. As the result of said abuse, S.S. was hospitalized at Charter Hospital for approximately one week, and is presently institutionalized at a psychiatric treatment facility in Kansas City, Missouri.

24. That Defendant McMullen had an affirmative duty to protect S.S., a child in the State's custody from reasonably foreseeable injury.

25. That the Defendant failed to exercise professional judgment in pursuing the child's release from the custody and protection of the State because she knew or should have known that the father had not protected and would not protect the child from Joel Griffis and that S.S.'s subsequent sexual molestation was reasonably foreseeable.

Further, Defendant McMullen failed to comply with the state statutes including, but not limited to Sections 210.115 and 210.145 R.S.Mo. and Division of Family Services policies regarding the handling and reporting of allegations of sexual abuse while the child was in Division custody.

26. The above-described actions by Defendant McMullen deprived Plaintiff of her Civil Rights and have caused her actual damages.

27. The above-described actions by Defendant McMullen show a deliberate and conscious indifference to the Plaintiff's safety and well-being and violate S.S.'s constitutional right to be reasonably safe from harm, thereby entitling Plaintiff to punitive damages.

WHEREFORE, Plaintiff prays that:

a. This Court declare that Defendant McMullen

was deliberately indifferent to the Plaintiff's safety and liberty interest in violation of the Plaintiff's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

b. That this Court award Plaintiff actual and punitive damages;

c. That Plaintiff be awarded costs and attorney's fees for this action; and

d. For such other and further relief as this Court deems just and proper.

COUNT II

For Count II of Plaintiff's Complaint against Defendant Jacoby, Plaintiff states and alleges as follows:

28. Plaintiff hereby incorporates by reference as though fully set forth herein paragraphs 1 through 27 of her Complaint.

29. On May 9, 1997, Defendant Jacoby was assigned as a Social Service Worker II on the case of S.S. and her parents.

30. Defendant Jacoby's dictation indicates that she was aware of S.S.'s inappropriate sexual acting out behaviors on at least three occasions; May 21, 1995, June 2, 1995 and July 3, 1995.

31. Defendant Jacoby was aware of the foster mother's telephone call to the Division on June 20, 1995 which stated that, ". . . S. told her over and over that she humps with

her Daddy, Jon."

32. Defendant Jacoby knew that Joel Griffis was present at visits between S.S. and her father on July 18, 1995 and August 25, 1995. Further, she documents knowledge of the anonymous telephone call received by her office regarding Griffis' history as a pedophile on September 21, 1995.

33. Defendant Jacoby concurred with the decision to begin unsupervised visits between the father and S.S. on September 21, 1995. Further, the Defendant received a telephone call from the foster parent on October 6, 1995 telling her that Joel Griffis was with the father when he came to pick up S.S. for her unsupervised visit.

34. Defendant Jacoby was aware that Joel Griffis had been present at the unsupervised Thanksgiving weekend visit in November 1995. Defendant also knew of contact with Mr. Griffis and S.S. on January 10, 1996.

35. That Defendant Jacoby knew on December 19, 1995 that S.S. (a four year old child) had a yeast infection and was complaining of ". . . hurting in her vagina area."

36. That Defendant Jacoby had an affirmative duty to protect S.S., a child in the State's custody from reasonably foreseeable injury.

37. That Defendant Jacoby failed to exercise professional judgment in allowing the child's placement back in the house because she knew or should have known that the father had not protected and would not protect the child from Joel Griffis and that S.S.'s subsequent molestation was reasonably foreseeable.

Further, Defendant Jacoby failed to comply with State statutes including, but not limited to, Sections 210.115 and 210.145 R.S.Mo. and Division of Family Services policies regarding the handling and reporting of allegations of sexual abuse.

38. The above-described actions by Defendant Jacoby deprived Plaintiff of her Civil Rights and have caused her actual damages.

39. The above-described actions by Defendant Jacoby show a deliberate and conscious indifference to the Plaintiff's safety and well-being and violate S.S.'s constitutional right to be reasonably safe from harm, thereby entitling Plaintiff to punitive damages.

WHEREFORE, Plaintiff prays that:

a. This Court declare Defendant Jacoby was deliberately indifferent to the Plaintiff's safety and liberty interests in violation of the Plaintiff's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

b. That this Court award Plaintiff actual and punitive damages;

c. That Plaintiff be awarded costs and attorney's fees for this action; and

d. For such other and further relief as this Court deems just and proper.

COUNT III

For Count III of Plaintiff's Complaint against Defendant Barnett, Plaintiff states and alleges as follows:

40. Plaintiff hereby incorporates by reference as though fully set forth herein paragraphs 1 through 39 of her Complaint.

41. Plaintiff's child abuse case was assigned to Defendant McMullen in February of 1994 and additionally to Defendant Jacoby in May of 1994, both social workers under direct supervision of Defendant Barnett.

42. All of Social Service Workers' McMullen and Barnett's case files were accessible, and under the direct supervision of Defendant Barnett, as a Social Service Supervisor I. Further, Defendant Barnett received and approved all dictation, correspondence and written reports regarding the Plaintiff during the time that she was in the Division of Family Service's custody from January 20, 1994 until August 22, 1996.

43. Although aware of the father's repeated failure and refusal to protect S.S. from Joel Griffis, Defendant Barnett approved the plan to allow the father unsupervised visitation with S.S. from October 6, 1995 until March of 1996. Defendant Barnett approved the decision to send S.S. to live with her father full-time on an "extended visit" from March 6, 1996 until the child's release from jurisdiction on August 22, 1996.

44. Defendant Barnett concurred with and approved of her worker's request that the Court release S.S. from the custody of the State and at a meeting on August 21, 1996, Defendant Barnett and Defendant McMullen agreed to request S.S.'s release from the Court's jurisdiction and protection. It was decided that ". . . if something happens to S. because he

[the father] knows what Joell [sic] has done in the past that [sic] he will be solely responsible."

45. Although S.S.'s file is replete with evidence and allegations of sexual abuse during the time she was in the custody of the Missouri Division of Family Services, Cass County Division; Defendant Barnett failed to protect the child by properly pursuing hotline investigations and by allowing the unsupervised contact with the father to continue.

46. That Defendant Barnett had an affirmative duty to protect S.S., a child in the State's custody from reasonably foreseeable injury.

47. That Defendant Barnett failed to exercise professional judgment in pursuing the child's release from the custody and protection of the State because she knew or should have known that the father had not protected and would not protect the child from a known pedophile and that S.S.'s subsequent molestation was reasonably foreseeable.

Further, Defendant Barnett failed to comply with State statutes including, but not limited to, Sections 210.115 and 210.145 R.S.Mo. and Division of Family Services policies regarding the handling and reporting of allegations of sexual abuse while the child was in Division custody.

48. The above-described actions by Defendant Barnett deprived Plaintiff of her Civil Rights and have caused her actual damages.

49. The above-described actions by Defendant Barnett show a deliberate and conscious indifference to the Plaintiff's safety and well-being and violate S.S.'s constitutional right to be reasonably safe from harm, thereby entitling Plaintiff

to punitive damages.

WHEREFORE, Plaintiff prays that:

a. This Court declare that Defendant Barnett was deliberately indifferent to the Plaintiff's safety and liberty interests in violation of the Plaintiff's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

b. That this Court award Plaintiff actual and punitive damages;

c. That Plaintiff be awarded costs and attorney's fees for this action; and

d. For such other and further relief as this Court deems just and proper.

COUNT IV

For Count IV of Plaintiff's Complaint against Defendant Montgomery, Plaintiff states and alleges as follows:

50. Plaintiff hereby incorporates by reference as though fully set forth herein paragraphs 1 through 49 of her Complaint.

51. The Missouri Division of Family Services contracted with Defendant Montgomery, a licensed psychologist, to treat Plaintiff beginning in April of 1995.

52. Defendant Montgomery's Monthly Report dated November 21, 1995, indicates her awareness that the father's friend, Joel Griffis, was a pedophile and that he was having

contact with S.S.

53. On or about March 11, 1996, S.S. told Defendant Montgomery that the father's roommate "Blinky" had touched her and ". . . asked her to touch him."

54. Although in receipt of Dr. Gregory Sisk's psychological evaluation of the father and the concerns expressed within, Defendant Montgomery continued to condone the unsupervised contact between S.S. and her father.

55. On or about August 21, 1996, Defendant Montgomery recommended to the Division of Family Services that S.S. be returned to the custody of the father.

Further, on or about August 15, 1996, the father admitted to defendant Montgomery, after repeated denials, that he had been allowing contact between Griffis and S.S., ". . . sometimes every day. . ." all along. The father also admitted to Montgomery that he had told S.S. to lie about the contact.

56. That Defendant Montgomery had an affirmative duty to protect S.S., a child in the State's custody from reasonably foreseeable injury.

57. That Defendant Montgomery failed to exercise professional judgment in recommending the child's release from the custody and protection of the State because she knew or should have known that the father had not protected and would not protect the child from a known pedophile and that S.S.'s subsequent sexual molestation was reasonably foreseeable.

Further, Defendant Montgomery failed to comply with State statutes, including, but not limited to, Section 210.115 R.S.Mo. regarding the reporting of allegations of sexual abuse to a child.

58. The above-described actions by Defendant Montgomery deprived Plaintiff of her Civil Rights and have caused her actual damages.

59. The above-described actions by Defendant Montgomery show a deliberate and conscious indifference to the Plaintiff's safety and well-being and violate S.S.'s constitutional right to be reasonably safe from harm, thereby entitling Plaintiff to punitive damages

WHEREFORE, Plaintiff prays that:

a. This Court declare that Defendant Montgomery was deliberately indifferent to the Plaintiff's safety and liberty interests in violation of the Plaintiff's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

b. That this Court award Plaintiff actual and punitive damages;

c. That Plaintiff be awarded costs and attorney's fees for this action; and

d. For such other and further relief as this Court deems just and proper.

JURY DEMAND

Plaintiff hereby requests a trial by jury on all counts of her Complaint.

Respectfully submitted,

POLSINELLI, WHITE, VARDEMAN & SHALTON
A PROFESSIONAL CORPORATION

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